

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MIKE KREIDLER,

Plaintiff,

v.

DANNY L. PIXLER, *et al.*,

Defendants.

Case No. C06-0697RSL

ORDER GRANTING PLAINTIFF'S  
MOTION *IN LIMINE* REGARDING  
DEFENDANTS' EXPERT  
WITNESSES

This matter comes before the Court on plaintiff's motion *in limine* to preclude the introduction of the opinions of defendants' experts, Wayne Stratton and Cassandra Undlin. At the parties' request, the Court heard oral argument in this matter on April 12, 2010. For the reasons set forth below, the motion is granted.

**A. Defendants' Expert Wayne Stratton.**

Defendants plan to introduce the expert opinion of Wayne Stratton, a CPA, certified forensic accountant, and a certified fraud examiner. In his report, Stratton states that his "objective was to summarize payments made to Midwest by or on behalf of Cascade and the corresponding disbursement by Midwest for the benefit of Cascade." Declaration of Victoria Vreeland (Dkt. #218) ("Vreeland Decl."), Ex. A.

1 Plaintiff contends that Stratton's expert report does not meet the minimum  
2 threshold reliability standard of Federal Rule of Evidence 702, which provides that a  
3 witness may testify as an expert about a topic if (1) the testimony is based upon sufficient  
4 facts or data, (2) the testimony is the product of reliable principles and methods, and (3)  
5 the witness has applied the principles and methods reliably to the facts of this case. In his  
6 expert report, which comprises approximately one page, Stratton opined that "Midwest  
7 has paid the claims for Cascade that it obtained funds to pay from CSRV/CURA/ASRC."  
8 Vreeland Decl., Ex. A. His opinion is based on two pieces of data: (1) a QuickBooks disc  
9 "containing the general ledger activity of Midwest from January 1, 2003 to December 31,  
10 2005," and (2) an "ASRC Disbursement Summary" which Stratton "obtained from  
11 counsel." Id.

12 Both pieces of data are problematic. Stratton's report contains no evidence that the  
13 Midwest QuickBooks ledger is reliable. In contrast, the record in this case contains  
14 ample evidence that it is not. According to Midwest's Chief Financial Officer, the  
15 QuickBooks ledger was not maintained in accordance with good accounting practices.  
16 Declaration of Victoria Vreeland, (Dkt. #147), Ex. E at p. 168. Midwest's bookkeeper  
17 placed all revenue and all disbursements into the same account. Id. Because of the  
18 irregularities, Midwest's own CFO could not "make sense" out of the QuickBooks. Id. at  
19 p. 179. The QuickBooks ledger was significantly revised years after the entries were  
20 made when Midwest's financial records were subpoenaed. Id. at pp. 185-86. Despite the  
21 lack of reliability of the QuickBooks, Stratton's report accepts them as if they are  
22 accurate.

23 Even if there were sufficient evidence to show that the QuickBooks contain  
24 reliable data, there is no evidence that the Disbursement Summary "from counsel" has  
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1 any indicia of reliability. It is not a document created in the ordinary course of business.  
2 It is not authenticated. Although Stratton claims to have received the document from  
3 defense counsel, defense counsel did not provide a declaration supporting that assertion  
4 or providing any foundation for the data therein. Even if he had, defense counsel is not a  
5 witness, and presumably, does not plan to be a witness at trial. No one has come forward  
6 to explain how the Disbursement Summary was created. Without any basis to evaluate its  
7 creation or underlying data, the Court cannot conclude that the Disbursement Summary  
8 contains reliable data. Nor is there any evidence that Stratton sought to verify the  
9 information presented to him. Because of its reliance on unreliable data, Stratton's  
10 opinion is not based upon sufficient facts or data as required by Federal Rule of Evidence  
11 702.

12 Defendants counter that the expert opinion is admissible even if the Disbursement  
13 Summary itself is not. They note that Federal Rule of Evidence 703 provides that the  
14 underlying facts and data need not be admissible "[i]f [it is] of a type reasonably relied  
15 upon by experts in the field in forming opinions or inferences upon the subject." In this  
16 case, there is no evidence that an unauthenticated summary – created by counsel for  
17 purposes of litigation – is something on which an expert would normally rely. Any such  
18 assertion is contrary to common sense.<sup>1</sup>

19 Defendants contend that the lack of indicia of reliability of the data goes to the  
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21 <sup>1</sup> The fact that Stratton developed his opinion solely for purposes of this litigation  
22 further undermines his reliability. See, e.g., Daubert v. Merrell Dow Pharm., Inc., 43  
23 F.3d 1311, 1317 (9th Cir. 1995) (explaining that, in considering whether to admit expert  
24 opinions, courts should consider whether experts are "proposing to testify about matters  
25 growing naturally and directly out of research they have conducted independent of the  
litigation, or whether they have developed their opinions expressly for purposes of  
testifying.").

1 weight of Stratton's opinion, not its admissibility. Federal Rule of Evidence 702,  
2 however, counsels otherwise. Moreover, this Court must perform its "gatekeeper" role,  
3 which includes excluding an expert opinion that is based solely on data devoid of any  
4 indicia of reliability. See, e.g., Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999)  
5 (explaining that courts have "the task of ensuring that an expert's testimony both rests on  
6 a reliable foundation and is relevant to the task at hand."). Accordingly, Stratton's  
7 opinion is inadmissible because it is not based upon sufficient facts or data as required by  
8 Federal Rule of Evidence 702. Because the Court finds that Stratton's report should be  
9 excluded on that basis, it need not consider plaintiff's additional arguments regarding its  
10 admissibility.

11 **B. Defendants' Expert Cassandra Undlin.**

12 Plaintiff seeks to exclude the expert testimony of Cassandra Undlin of Strategic  
13 Opportunity Solution. Although it appears that her resume was originally appended to  
14 her report, it was not included in the copy filed in the record, and the record does not  
15 include other information about her qualifications. Nevertheless, because plaintiff  
16 focuses his objections on the content of her opinions rather than her qualifications, the  
17 Court will do the same.

18 Plaintiff contends that Undlin's opinions relate only to affirmative defenses that  
19 the Court has stricken. Defendants contend that prior to the sale of Cascade to a third  
20 party, Cascade's former president and CEO, Harold Anderson, misrepresented and failed  
21 to disclose various facts to the purchasing entity and to Danny Pixler. Because plaintiff  
22 claims that those matters should be excluded, he requests that the Court prohibit Undlin  
23 from testifying about them. The Court has held by separate order that defendants are  
24 precluded from introducing evidence regarding Cascade and Anderson's alleged  
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1 misrepresentations in connection with the sale of the company. Because Undlin's  
2 testimony is based on the excluded evidence, her testimony must be excluded as well.

3 Even if it were otherwise admissible, Undlin's testimony presents two additional  
4 problems. First, in her report, Undlin offers legal conclusions, including repeatedly  
5 stating that certain statements and omissions constituted a "material misrepresentation."  
6 Vreeland Decl., Ex. B. The Court will not permit Undlin to testify regarding legal  
7 conclusions. Second, Undlin frequently opines that if a "reasonable person" had known  
8 of the facts that Cascade and Anderson allegedly omitted or misrepresented, that person  
9 would not have purchased Cascade. Undlin's report does not state a foundation for that  
10 opinion, which is speculative. Furthermore, the jury can make its own determination  
11 regarding what a reasonable person might do. Accordingly, the Court will not permit  
12 Undlin to testify.

13 For all of the foregoing reasons, plaintiff's motion *in limine* regarding defendants'  
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1 expert witnesses (Dkt. #217) is GRANTED.<sup>2</sup>

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3 DATED this 14th day of April, 2010.

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7 Robert S. Lasnik  
8 United States District Judge  
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21 <sup>2</sup> The Court notes that the findings and conclusions in this order, like all rulings *in*  
22 *limine*, are preliminary and can be revisited at trial based on the facts and evidence as  
23 they are actually presented. See, e.g., Luce v. United States, 469 U.S. 38, 41 (1984)  
24 (explaining that a ruling *in limine* “is subject to change when the case unfolds,  
25 particularly if the actual testimony differs from what was contained in the proffer. Indeed  
even if nothing unexpected happens at trial, the district judge is free, in the exercise of  
sound judicial discretion, to alter a previous *in limine* ruling.”). Subject to these  
principles, the Court issues this ruling for the guidance of the parties.